LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
SEP 23 1968
JOHN F. DAVIS, CLERK

In the

Supreme Court of the United States

OCTOBER TERM, 1968

No. 71

PRESBYTERIAN CHURCH IN THE UNITED STATES, ET AL.,
Petitioners.

VS.

MARY ELIZABETH BLUE HULL MEMORIAL PRESBYTERIAN CHURCH,
Respondent,

VS.

EASTERN HEIGHTS PRESBYTERIAN CHURCH, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

BRIEF OF RESPONDENTS

OWEN H. PAGE
305 Realty Building
Savannah, Georgia 31401
Attorney for Respondents Eastern Heights Presbyterian Church, et al.

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106. HArrison 1-3080

INDEX

Statement of the Case 1

Argument—

I. The Writ of Certiorari Was Improvidently Granted and Should Be Dismissed 3

II. *Watson* v. *Jones*, 80 (13 Wall.) U.S. 679 (1871), Is Not Violated Where the Highest Judicatory Has Transgressed Its Constitution 15

III. The Decision Complained of Justifies the Application of the Principles of *Brundage* v. *Deardorf*, 55 F. 839 (1893) and *Gonzalez* v. *Archbishop*, 280 U.S. 1 (1929) Which Modified *Watson* v. *Jones*, 80 (13 Wall.) U.S. 679 (1871) 18

IV. The Rigid Enforcement by This Court of *Watson* v. *Jones*, 80 (13 Wall.) U.S. 679 (1871) Will Create a Tyranny of Property 23

V. Is the General Assembly of the Petitioner Church So Sovereign That It Can Ignore the Church's Constitution Without Fear of Judicial Intervention 29

VI. Under the Circumstances the Respondents Did Not Have to Appeal from the Actions of Either the General Assembly or the Administrative Commission 35

VII. The Wall of Separation Is Not So Impregnable That a Denominational Church Is Not Subject to Reasonable Restraints Upon the Liberties Guaranteed by the First Amendment 38

Rebuttal 42

Conclusion 43

TABLE OF CASES

Adderley v. *Florida*, 385 U.S. 39 (1966) 39

Aiken v. *Richardson*, 207 Ga. 735, 64 S.E. 2d 54 (1951) 4, 5

Bear v. *Heasley*, 98 Mich. 297, 57 N.W. 376 (1893) 33
Bouldin v. *Alexander*, 82 (15 Wall.) U.S. 131 (1872) 16, 19, 21, 30
Briscoe v. *Williams*, 192 S.W. 2d 643 (Mo. 1946) 30
Brown v. *Louisiana*, 383 U.S. 131 (1966) 39
Brundage v. *Deardorf*, 55 F. 839 (1893) 16, 19, 21
Cantwell v. *Connecticut*, 310 U.S. 296 (1940) 40
Capital City Dairy Co. v. *Ohio ex rel. Attorney General*, 183 U.S. 238 (1902) 8, 9
Central Union Telephone Co. v. *Edwardsville*, 269 U.S. 190 (1925) 8
Cox v. *Louisiana*, 379 U.S. 559 (1965) 39, 40, 41
Cox v. *Texas*, 202 U.S. 446 (1906) 8
Douglas v. *City of Jeannette*, 319 U.S. 157 (1943) 39
Edelman v. *California*, 344 U.S. 357 (1953) 8
Epperson v. *Myers*, 58 So. 2d 150 (Fla. 1952) 30
Forbes v. *State Council*, 216 U.S. 396 (1910) 13
Godchaux Company v. *Estopinal*, 251 U.S. 179 (1919) 10
Gonzalez v. *Archbishop*, 280 U.S. 1 (1929) 17, 19, 21
Harding v. *Illinois*, 196 U.S. 78 (1904) 9
Hartford Life Insurance Co. v. *Johnson*, 249 U.S. 490 (1919) 7
Hedgebeth v. *North Carolina*, 344 U.S. 806 (1948) 8
Herrin v. *Graham*, 209 Ga. 281, 71 S.E. 2d 550 (1952) 4
Herndon v. *Georgia*, 295 U.S. 441 (1935) 11
Herndon v. *State*, 179 Ga. 597, 176 S.E. 620 (1934) 11, 12, 13, 14
Jarvis v. *State*, 197 Ga. 704, 30 S.E. 2d 484 (1944) 5
Kedroff v. *St. Nicholas Cathedral*, 344 U.S. 94 (1952) 15, 19, 20, 33
Kerr's Appeal, 89 Pa. 97 31
Kreker v. *Shirey*, 163 Pa. 534, 30 A. 440 (1894) 17

McMillen v. *Ferrum Mining Co.*, 197 U.S. 343 (1905) 12, 13
Norton v. *Shelby County*, 118 U.S. 425 (1886) 35
Paraiso v. *United States*, 207 U.S. 368 (1907) 13
Radio Station WOW, Inc. v. *Johnson*, 326 U.S. 120 (1944) 10
Randolph v. *First Baptist Church of Lockland*, 120 N.E. 2d 485 (Ohio 1954) 31
Reynolds v. *United States*, 98 U.S. 145 (1879) 38
Richmond Concrete Products Co. v. *Ward*, 212 Ga. 773, 95 S.E. 2d 667 (1956) 5
Romanian Orthodox Missionary Episcopate v. *Trutza*, 205 F.2d 107 (1953) 15, 21
Serbian Eastern Orthodox Diocese v. *Ocokoljich*, 219 N.E. 2d 343 (Ill. 1966) 17, 22
Sims v. *Greene*, 160 F. 2d 512 (1947) 17
Stewart v. *Board of Commissioners of Echols County*, 192 Ga. 139, 14 S.E. 2d 728 (1941) 6
Stewart v. *Jarriel*, 206 Ga. 855, 55 S.E. 2d 368 (1950) 22
The Disconto Gesellschaft v. *Umbreit*, 208 U.S. 570 (1908) 12, 13
Trustees of Delaware Annual Conference v. *Ennis*, 29 A.2d 374 (Del. 1942) 30, 35
Watson v. *Jones*, 80 (13 Wall.) U.S. 679 (1871) 15, 16, 17, 18, 19, 20, 21, 22, 24, 27, 33, 38

ARTICLES

Dissent—1968, Tulane Law Review, Vol. XLII, No. 4, pp. 726-739 (June, 1968) 40
"Jurisdiction of Civil Courts Over Religious Issues", 20 Ohio State Law Journal, 508 (1959) 20, 29
The Federalists, No. 15 (Hamilton) 39

In the

Supreme Court of the United States

OCTOBER TERM, 1968

No. 71

PRESBYTERIAN CHURCH IN THE UNITED STATES, ET AL.,
Petitioners,

VS.

MARY ELIZABETH BLUE HULL MEMORIAL PRESBYTERIAN CHURCH,
Respondent,

VS.

EASTERN HEIGHTS PRESBYTERIAN CHURCH, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

BRIEF OF RESPONDENTS

STATEMENT OF THE CASE

On April 17, 1966, the congregation of the Respondent Church by a unanimous vote severed its relationship with the Savannah Presbytery and the Petitioner Church. In a

resolution, adopted that date, it charged the Petitioner Church's highest judicatory with specific violations of the dogma and discipline that existed at the time of its affiliaton in 1930. Predominantly, the General Assembly of the Petitioner Church was accused of advocating civil disobedience, counseling on the Viet Nam War, and engaging in other political activities—all in violation of the Westminster Confession of Faith and the Constitution of the Petitioner Church.

The action of the Respondent Church was within the freedom of religion clause of the First Amendment of the Constitution of the United States and did not violate the constitution of the Petitioner Church.

About a month after the Respondent Church had disaffiliated, the Savannah Presbytery, a lesser judicatory of the Petitioner Church, appointed an Administrative Commission. This commission adopted a resolution which threatened the peace and integrity of the Respondent Church. Fearful of a trespass upon church property and interference with church activities, the Respondents sought a permanent injunction in the Superior Court of Chatham County, Georgia. The Petitioners answered the Respondents' petition and sought the same equitable relief.

At trial, evidence was presented sustaining the charged violations. It was clear and concisive. It was not rebutted or refuted.

Parts of the Petitioner Church's constitution, which prohibit it from engaging in the activities charged, were introduced. These constitutional inhibitions were the legal standards applied in determining whether or not the Petitioner Church had transgressed its dogma and discipline.

The trial court's verdict and judgment was for the Respondents. The Petitioners then appealed to the Supreme

Court of Georgia. It affirmed the judgment of the lower court. The Petitioners' motion for rehearing was denied.

Subsequently, the Petitioners filed a petition for a writ of certiorari in this Court on April 30, 1968. It was granted on June 10, 1968.

ARGUMENT

I.

The Writ of Certiorari Was Improvidently Granted and Should Be Dismissed

The writ of certiorari should be dismissed as being improvidently granted. Examination of the Petitioners' pleadings from answer to appeal will expose the fatal deficiency in them. No Federal question was raised in the trial court by the Petitioners' pleadings, rulings of the court, or requests for charge. None was presented to the Supreme Court of Georgia in the enumeration of errors in the trial court. None was considered by the Supreme Court of Georgia in its decision affirming the judgment of the trial court.

The decision of the Supreme Court of Georgia did not rule on any constitutional question as the Petitioners failed to raise timely and appropriately any such question under the rules of that Court. In determining whether the Supreme Court of Georgia, either in its initial decision or its subsequent denial of the motion for rehearing, considered or ruled upon a Federal question, reference to the case law of the State of Georgia must be made. That Court has adopted the rule that it will not consider or rule upon a constitutional question unless the same is raised by proper pleading or motion in the trial court, and it must have been ruled upon by the trial court.

The record stands as an indelible account of the Petitioners' absolute failure to raise a constitutional question in the trial court. Further it is mute as to any ruling sought by the Petitioners on a constitutional issue and any ruling rendered by the trial court. This failure becomes a haunting indictment at this stage of the Petitioners' effort to have this Court review the decision of the Supreme Court of Georgia. It becomes a disastrous reality when the rules of the Supreme Court of Georgia are examined and applied.

In *Herrin* v. *Graham*, 209 Ga. 281, 71 S.E. 2d 550 (1952), on an appeal to the Supreme Court in an adoption proceeding, the exceptions recited that the adoption law was illegal and contrary to the Constitution and laws of the State. The Supreme Court in dismissing the constitutional issue held:

> "Where it is sought to invoke a ruling by the Supreme Court on a constitutional question, the question must have been raised in the trial court and a ruling made thereon and the case brought to the Supreme Court for review."

In establishing when the constitutional question must be raised, the Supreme Court of Georgia in *Aiken* v. *Richardson*, 207 Ga. 735, 64 S.E. 2d 54 (1951), stated:

> "Jurisdiction is not vested in the Supreme Court merely because it is contended that an action or judgment is or would be contrary to some provision of the Constitution.
>
> A constitutional question can not be raised for the first time in the Supreme Court. Where it is sought to invoke a ruling by the Supreme Court on a constitutional question, the question must have been raised in the trial court and a ruling made thereon and the case brought to the Supreme Court for review. Assignments of error upon constitutional questions

which are raised for the first time in the bill of exceptions can not be considered by this Court."[1]

Applying the rule in *Aiken*, it is manifest that the Petitioners' effort to raise the constitutional question on the motion for rehearing was simply too little.

The assignments of error involved in *Aiken* are equivalent to the enumeration of errors filed by the Petitioners from the judgment and verdict of the trial court. There the similarity ends. Unlike the Appellant in *Aiken*, the Petitioners did not raise a constitutional question in the enumeration filed in the Supreme Court of Georgia.

Applying the rules of the Supreme Court of Georgia, as no Federal question was properly raised in the trial court, whatever was presented to it on the motion for rehearing and whatever disposition was made of it—absent "entertaining and deciding"—the Supreme Court did not pass upon and could not have considered the Federal questions belatedly raised by the Petitioners in their motion.

Though the above cases are dispositive of the timeliness and appropriateness of the constitutional question, this Court may be interested in what specificity is required to properly raise a constitutional question in Georgia. Definiteness is demanded. The requisite detail is set forth in *Richmond Concrete Products Co.* v. *Ward*, 212 Ga. 773, 774, 95 S.E. 2d 677, 678 (1956). Formulating what is required, the Supreme Court stated:

> "(1) The statute or the particular part or parts of the statute which the party would challenge must be stated or pointed out with fair precision; (2) the provision of the Constitution, which it is claimed has been violated, must be clearly designated; and (3) it must be shown wherein the statute, or some designated part of it, violates such constitutional provision."

---

[1]Also see *Jarvis* v. *State*, 197 Ga. 704, 30 S.E. 2d 484 (1944).

It is acknowledged that these criteria apply to challenging the constitutionality of a statute. However, the second and third criteria are applicable in evaluating whether the Petitioners' pleading in the trial court meets the test of definiteness. Do they clearly designate what provision of the constitution has been violated—and how? The answer filed in the present case alleged:

> "15. Defendants have a right of possession of the subject property under the laws and constitution of the Southern Presbyterian Church, the State of Georgia, and the United States of America.
>
> 16. Since said date of April 17, 1966, the aforesaid Plaintiff and members of the congregation and said Ruling Elders who voted in the affirmative on said Resolution, have appropriated the property which is the subject of this legal action to their use as a Church separate and independent from the Southern Presbyterian Church, said action being in violation of the laws of Georgia, the United States of America, and the Southern Presbyterian Church." (A. 27)

These two paragraphs are the only reference which even vaguely deal with a constitutional issue. It is because of their vagueness as to the specific law or part of the constitution violated that the Petitioners' pleading was inadequate to present a constitutional question in the trial court.

The inadequacy of the Petitioners' pleading is emphasized when compared with *Stewart* v. *Board of Commissioners of Echols County*, 192 Ga. 139, 14 S.E. 2d 728 (1941). In a condemnation proceeding, the Appellant filed a demurrer and a Motion to Dismiss a declaration of taking on a constitutional ground. The Supreme Court of Georgia affirming the overruling of the motion and demurrer held:

> "This respondent demurs and moves to dismiss the declaration, on the ground it contravenes and violates the constitution of Georgia, article 1, section 3, para-

graph 1. This was insufficient to give this court jurisdiction of a bill of exceptions in which error is assigned on the overruling of the demurrer."

When the present case is compared with *Stewart*, which alleged with considerable detail what section of the constitution was violated, it is obvious that the ambiguous language of the pleading fails to meet not only the required specificity as to "what" was transgressed but also "how".

How does the absence of a Federal question in the state court affect the jurisdiction of this Court? It is well settled that when, under the requirements of the rules of practice of the state court, the constitutional issue is not properly raised so it can be considered by the state appellate court, this Court will accept as final the criteria established by the state court.

In *Hartford Life Ins. Co.* v. *Johnson*, 249 U.S. 490, 493 (1919), Mr. Justice Clarke in dismissing the writ affirmed:

> *"It is the settled law that this provision means 'that the claim must be asserted at the proper time and in the proper manner by pleading, motion, or other appropriate action under the state system of pleading and practice,* . . . and upon the question whether or not such a claim has been so asserted, *the decision of the state court is binding upon this court when it is clear, as it is in this case, that such decision is not rendered in a spirit of evasion*, for the purpose of defeating the claim of a Federal right.'"

He added:

> "No suggestion is or could be made, that the Missouri state supreme court's holding in this case was framed to evade the consideration of the Federal right now asserted, for it had long been the established law of that state that, under its system of practice, the construction of either the Federal or state Constitution

would not be treated as involved in a case, in a jurisdictional sense, unless it appeared that such question was raised and ruled on in the trial court. . ." (Emphasis added)

Mr. Chief Justice Taft in *Central Union Telephone Co. v. Edwardsville*, 269 U.S. 190, 195 (1925), reiterated the authority of the state court to prescribe rules as to jurisdiction and practice. He stated:

> "Without any doubt it rests with each state to prescribe the jurisdiction of its appellate courts . . . and the rules of practice to be applied in its exercise; and the state law and practice in this regard are no less applicable when Federal rights are in controversy."[2]

Time has not altered this Court's recognition of the right in the state courts to establish the rules governing jurisdiction and practice. In *Hedgebeth* v. *North Carolina*, 334 U.S. 806, 807 (1948), this Court, in dismissing a writ of certiorari for jurisdictional deficiencies, stated:

> "Petitioners' rights under the Federal Constitution must be pursued according to the procedural requirements of North Carolina."[3]

The Petitioners are attempting to save their dead cause with the panacea that the Federal question was raised in the motion for rehearing. This, too, must fail. To revive the cause with sufficient viability at that stage, the Petitioners must meet the test of specification established by this Court.

In *Capital City Dairy Co.* v. *Ohio ex rel. Attorney General*, 183 U.S. 238, 248 (1902), the specification required by this Court is declared:

> "It is settled that this court, on error to a state court, cannot consider an alleged Federal question,

---

[2]Also see *Cox* v. *Texas*, 202 U.S. 446 (1906).

[3]Followed by this Court in *Edelman* v. *California*, 344 U.S. 357, 359 (1953).

when it appears that the Federal right thus relied upon had not been by adequate specification called to the attention of the state court, and had not been by it considered, not being necessarily involved in the determination of the cause. *Green Bay & M. Canal Co.* v. *Patten Paper Co.*, 172 U.S. 62, 67, 43 L. Ed. 365, 368, 19 Sup. Ct. Rep. 97; *F. G. Oxley Stave Co.* v. *Butler County*, 166 U.S. 648, 654, 655, 41 L. Ed. 1149, 1151, 17 Sup. Ct. Rep. 709, and cases cited. *Now, the only possible support to the claim that a Federal question on the subject under consideration was raised below was the general statement in the answer to which we have already adverted, that 'this proceeding is in violation of the Constitution of the United States'. Nowhere does it appear that at any time was any specification made as to the particular clause of the Constitution relied upon to establish that the granting of relief by quo warranto would be repugnant to that Constitution;* nor is there anything in the record which could give rise even to a remote inference that the mind of the state court was directed to or considered this question. On the contrary, it is apparent from the record that such a contention was not raised in the state court."[4] (Emphasis added)

The above language in *Capital City Dairy Co.*, "violation of the Constitution of the United States", is almost identical with that found in Paragraph 16 of the Petitioners' answer. The difference is the use of the word "laws" by the Petitioners rather than the word "Constitution". It is submitted that the broad meaning of the word "laws" renders the Petitioners' answer less specific than that of *Capital City Dairy Co.* However, there is one significant comparison between that case and the present case—the total absence of specification. Neither case specifies what particular law or clause is violated. The absence of specification is fatal to the Petitioners' cause.

---

[4]Also see *Harding* v. *Illinois*, 196 U.S. 78 (1904); *Herndon* v. *Georgia*, 295 U.S. 441 (1935).

The rule that this Court has followed when the Federal question was raised for the first time in the motion for rehearing was recognized by Mr. Justice McReynolds in *Godchaux Company* v. *Estopinal*, 251 U.S. 179, 181 (1919). In dismissing the writ of error, he repeated the well established rule of this Court:

> "The settled rule is that, in order to give us jurisdiction to review the judgment of a state court upon writ of error, the essential Federal question must have been especially set up there at the proper time and in the proper manner; and, further, that if first presented in a petition for a rehearing, it comes too late unless the court actually entertains the petition and passes upon the point."[5]

To avoid the error committed in the trial court, the Petitioners with considerable elaboration thrust Federal questions before the Georgia Supreme Court in the motion for rehearing. Assuming that this was not too late under the test in *Godchaux*, did the Supreme Court of Georgia entertain the motion and pass upon the nine grounds asserted therein?

The record negates that it entertained the motion and passed upon the grounds urged. The judgment of the lower court rendered in response to the motion for rehearing was:

> "Upon consideration of the motion for a rehearing filed in these cases, it is ordered that it be hereby denied." (A. 153)

In the sense used by Mr. Justice McReynolds, to entertain the motion is more than just receiving it. This the court had to do under the appellate procedure of the state. Similarly the word "pass" takes on a more substantial meaning than just a terse denial.

---

[5]Also see *Radio Station WOW, Inc.* v. *Johnson*, 326 U.S. 120, 128 (1944) and cases cited at page 128.

In *Herndon* v. *Georgia*, 295 U.S. 441 (1935), it was held that the Federal question was never properly presented in the state supreme court unless it was upon the motion for rehearing.[6] Noting that the state court refused to consider it, Mr. Justice Sutherland ruled that unless that court actually entertained the question and decided it, the Federal question is raised too late upon a motion for rehearing.

What was the action of the Supreme Court of Georgia on the motion in *Herndon*? This Court is urged to examine the decision[7] and compare it with the action of the Supreme Court of Georgia in the case under review. It will reveal that the Petitioner in *Herndon*, as here, did not raise a Federal question until after the Supreme Court of Georgia had rendered its judgment. Petitioner then filed a motion for rehearing, asserting that the statute was repugnant to the due process clause of the Fourteenth Amendment. In dealing with the constitutional question raised, the Georgia Court, in appraising the motion for rehearing, stated:

> ". . . , it is a mere attempt to draw into question the constitutionality of the statute under which the defendant was convicted, where no such question was raised and passed upon in the trial court. Under repeated rulings by this court, a constitutional question can not be so presented. . . Where it is sought to invoke a ruling by the Supreme Court on a constitutional question, the question must have been raised in the trial court and a ruling made thereon and the case brought to the Supreme Court for review." (179 Ga. at 600, 601)

The above is merely part of the opinion which, in considerable detail, records why the Supreme Court of Georgia

---

[6]There was a preliminary attack in the trial court on the ground that the statute was in violation "of the constitution of the United States", 295 U.S. at 443.

[7]*Herndon* v. *State*, 179 Ga. 597, 176 S.E. 620 (1934).

declined the motion for rehearing by the Appellant Herndon.

The decision denying the rehearing before the Georgia Supreme Court contains seven pages. The decision complained of by the Petitioners contains eight lines. Yet there is similarity in the judgments rendered. In *Herndon* the Court stated:

> "There is no merit in the Motion for Rehearing. The Motion for Rehearing is denied."

In the present case the court stated:

> "The Motion for Rehearing is without merit and is denied,"

Though Mr. Justice Sutherland did not define in *Herndon* what is meant by "entertains and decides", prior decisions of this Court made any detailed definition unnecessary. In *McMillen* v. *Ferrum Mining Co.*, 197 U.S. 343, 347 (1905), this Court, in dismissing a writ of error where the Federal question was raised for the first time in the state court in a motion for rehearing, stated:

> "It is sufficient for the purposes of this case to say that no Federal question appears to have been raised until the petition was filed for a rehearing. *This was obviously too late, unless, at least, the court grants the rehearing and then proceeds to consider the question.*" (Emphasis added)

Subsequently, in *The Disconto Gesellschaft* v. *Umbreit*, 208 U.S. 570, 577, 578 (1908), this Court, commenting upon the action of the state court on a motion for rehearing, held:

> "No allegation of Federal rights appeared in the case until the application for rehearing. In this application it was alleged that the effect of the proceedings in the state court was to deprive the plaintiff in error of its property without due process of law, contrary to

> the 14th Amendment, and to deprive it of certain rights and privileges guaranteed to it by treaty between the Kingdom of Prussia and the United States. The supreme court of Wisconsin, in passing upon the petition for rehearing and denying the same, dealt only with the alleged invasion of treaty rights, overruling the contention of the plaintiff in error. It is well settled in this court that it is too late to raise Federal questions reviewable here by motions for rehearing in the state court.
>
> *An exception to this rule is where the supreme court of the state entertains the motion and expressly passes upon the Federal question.*" (Emphasis added)

What was ruled by this Court in *McMillen* and *Gesellschaft* has been reaffirmed in *Paraiso* v. *United States*, 207 U.S. 368, 370 (1907) and *Forbes* v. *State Council*, 216 U.S. 396, 399 (1910), where this Court asserted that the Federal question must, in fact, have been passed on when the Federal question was raised for the first time in the state court in the motion for rehearing. All subsequent cases treating this issue, including *Herndon*, must be interpreted in the light of what was held by this Court in *McMillen* and *Gesellschaft*.

If under the long established "entertains and decides" test mentioned by Mr. Justice Sutherland, the action of the Supreme Court of Georgia on the motion for rehearing filed by the Appellant in *Herndon*, failed to meet the test, there is no question that the decision of the Supreme Court of Georgia in the case under review by this Court did not meet it. None of eight sentences, which comprise the opinion as distinguished from the judgment, declare that the Georgia Supreme Court granted the rehearing and proceeded to answer the questions presented.

In *Herndon*, that Court consumed three of the seven page opinion in replying why no constitutional question

was properly presented before the court. It did this after reciting in detail the grounds of the motion which comprise the first three pages of the opinion. The present case is in marked contrast to the detailed decision of the Supreme Court of Georgia in denying the motion in *Herndon*.

If this is not dispositive of the motion for rehearing, this language of the court will be. The Court declared:

> "Indeed it may be said that under the provision of our constitution, art. 6, sec. 2, par. 5 (Code Section 6502), which provides that the Supreme Court 'shall be a court alone for the correction of errors,' this court would in no event have jurisdiction to consider the merits of any question which is either intentionally or unintentionally omitted in the trial court. It is upon errors alleged by the complaining party to have been committed in the court below that this court must confine itself." (179 Ga. at 601)

The article of the Constitution referred to in *Herndon* as Code Section 6502 is now designated Code Section 3-204 of the Georgia Annotated Code. By statute and decision, the Supreme Court of Georgia had no jurisdiction of a constitutional question when the Petitioners appealed. There being no constitutional question presented in the Petitioners' pleading and none raised by motion or other appropriate action at trial, the trial court made no decision upon a constitutional question. It must follow that no error involving a constitutional question was brought to the Supreme Court of Georgia for review.

Though the judgment of the Supreme Court of Georgia on the motion for rehearing is silent as to any Federal question raised by the motion, the language of the Supreme Court of Georgia in *Herndon* is appropriate:

> "Accordingly, no question as to the constitutionality of Section 56 (statute) is presented, and none is decided." (179 Ga. at 601, 602)

As the Petitioners failed to seasonably raise the Federal question in the trial court under the procedure and laws of the State of Georgia, as no Federal question was entertained and expressly passed upon by the Supreme Court of Georgia in the motion for rehearing, and as the Petitioners' pleading failed to meet the specification standards of this Court, the writ of certiorari granted by this Court on June 10, 1968, should be dismissed as having been improvidently granted for lack of jurisdiction.

II.

Watson v. Jones, 80 (13 Wall.) U.S. 679 (1871), Is Not Violated Where the Highest Judicatory Has Transgressed Its Constitution

Where a property right between a local congregation and a representative church rests upon the conduct of the highest church tribunal, the civil court has the responsibility to determine if the church authority acted within its constitution. It is not required to blindly follow or accept the legal formula pronounced in *Watson* v. *Jones*, 80 (13 Wall.) U.S. 679 (1871), where it is proven that the highest tribunal has departed from the organic law that existed at the time of the affiliation of the local church.

The rigid formula promulgated in *Watson* lost its inflexibility in the succeeding years. The most recent case which has tested its rigidity is *Romanian Orthodox Missionary Episcopate* v. *Trutza*, 205 F. 2d 107 (1953). The facts are reminiscent of those contained in *Kedroff* v. *St. Nicholas Cathedral*, 344 U.S. 94 (1952). The spectre of the domination of the church by a Communist government resulted in a church property conflict between the alleged bishop appointed by a submissive Romanian Patriarch and the local episcopate. In finding for the episcopate, the Sixth Circuit Court of Appeals found that the episcopate

had the authority to revoke its affiliation with the Romanian Patriarch and Holy Synod of Romania because of the dictation of ecclesiastical appointments by the Communist controlled government. The court observed:

> "We also think that this conclusion is in accord with the spirit if not the letter of the *Kedroff* case, which declares that freedom to select the clergy, where no improper methods of choice are proven. . ." (205 F. 2d at 112)

Once again *Watson* as it pertains to the representative type of church government was modified. The decision of the Sixth Circuit Court of Appeals considered the propriety or impropriety of the methods of functioning on the highest church level. If the methods of the highest church judicatory or its equivalent are proven to have been improper, the court may look beyond the rule formulated in *Watson*.

The questioning of the unlimited power of the highest church judicatory began with *Bouldin* v. *Alexander*, 82 (15 Wall.) U.S. 131 (1872). With *Bouldin* the courts began to demand from the church tribunals adherence to basic concepts of equity. By implication *Bouldin* established that the court would only defer to a church tribunal which had followed its own procedural rules. This Court said:

> "In a congregational church, the majority, if they adhere to the organization and to the doctrines, represent the church."[8]

In *Brundage* v. *Deardorf*, 55 F. 839 (1893), which involved a dispute between two factions of the church of the United Brethren of Christ, a national hierarchical church, Judge Taft stated at pages 847-848:

---

[8]*Bouldin* v. *Alexander*, 82 (15 Wall.) U.S. at 140.

> "Even if the supreme judicatory has the right to construe the limitations of its own power, and the civil courts may not interfere with such a construction, and must take it as conclusive *we do not understand the supreme court, in Watson v. Jones, to hold that an open and avowed defiance of the original compact, and an express violation of it, will be taken as a decision of the supreme judicatory which is binding on the civil courts.* Certainly, the effect of Watson v. Jones cannot be extended beyond the principle that a bona fide decision of the fundamental law of the church must be recognized as conclusive by civil courts. *Clearly, it was not the intention of the court to recognize as legitimate the revolutionary action of a majority of a supreme judicatory, in fraud of the rights of a minority seeking to maintain the integrity of the original compact.*" (Emphasis added)

The impact of *Watson* was further minimized by *Gonzalez* v. *Archbishop*, 280 U.S. 1 (1929). Mr. Justice Brandeis observed at page 16:

> "In the absence of fraud, collusion or arbitrariness, the decisions of the proper Church tribunals on matters purely ecclesiastical, although affecting civil rights, are accepted in litigation before the secular courts as conclusive, because the parties in interest made them so by contract or otherwise."[9]

The modification of *Watson* by the federal judiciary continued with *Sims* v. *Greene*, 160 F.2d 512 (1947). In determining the procedural validity of the removal of a contesting bishop, the Third Circuit Court of Appeals in applying the law of the forum, the State of Pennsylvania, quoted from the opinion of Mr. Justice Williams of the Supreme Court of Pennsylvania in *Kreker* v. *Shirey*, 163 Pa. 534, 30 A. 440 (1894):

[9]See also *Serbian Eastern Orthodox Diocese* v. *Ocokoljich*, 219 N.E. 2d 343, 350 (Ill. 1966).

"The power of a civil court, as distinguished from that of an ecclesiastical tribunal, in respect to disputes between warring church factions is limited to an ascertainment of the pertinent church law, to inquiry as to whether or not that law has been conformed with by the churchly tribunal or judicatory, and to the enforcement of the judgment or order of the religious tribunal or judicatory if the order or judgment of the tribunal or judicatory of the church has been reached in accordance with the law of the church." (160 F. 2d at 515)

The adoption of the law of Pennsylvania by the Third Circuit Court of Appeals brings the tests projected by Judge Taft and Mr. Justice Brandeis into precise focus. No longer were the Federal courts bound by the formula of *Watson* v. *Jones, supra.*

The Supreme Court of Georgia has affirmed the proposition that judicial abstention is not absolute even in the internal affairs of a religious association. The courts will assume jurisdiction to decline the enforcement of a decision of an ecclesiastical tribunal where to enforce such decision would be offensive to the peace and good order of society, would approve an arbitrary or ultra vires act, or would be repugnant to the principle of equity.

III.

The Decision Complained of Justifies the Application of the Principles of Brundage v. Deardorf, 55 F. 839 (1893) and Gonzalez v. Archbishop, 280 U.S. 1 (1929), Which Modified Watson v. Jones, 80 (13 Wall.) U.S. 679 (1871)

The decision complained of can be affirmed by this Court under the principles enunciated in *Watson* v. *Jones, supra,* as modified by subsequent decisions. When *Watson* was decided in 1871, Mr. Justice Miller, in his classification of church systems, placed the civil courts in a sub-

ordinate role to the authority of the highest court of the representative class. That decision was challenged one year later in *Bouldin* v. *Alexander, supra.* The right of absolutism, apparently granted under *Watson* to the highest judicatory, came under subsequent scrutiny in *Brundage* v. *Deardorf, supra,* and *Gonzalez* v. *Archbishop, supra.* First Judge Taft and then Mr. Justice Brandeis questioned the thesis that the church could do no wrong. Each spelled out under what circumstances the civil court would reject the rubber stamp role of merely formalizing the actions of the highest church authority. *Kedroff* v. *St. Nicholas Cathedral,* 344 U.S. 94 (1952), swung the pendulum back towards *Watson* with the emphasis on the supremacy of the highest church authority.

Freedom of religion in its essence, if it is to mean anything, should mean the freedom in the individual to worship or not to worship, to affiliate or to disaffiliate. It is the collective rights of the individual worshipper of the Respondent Church, which are to be determined. The congregation voted unanimously to sever its relationship with the Petitioners.[10] What a worshipper could do individually, he could do collectively[11] under the guard of the First Amendment.

The soundness of *Kedroff* as good precedent is questionable. Its elevation of the liberty of the institution above that of the individual subverts the freedom clause of the First Amendment and contradicts this Court's philosophy of protecting the rights of the individual. This theory is persuasively presented in the following quotation:

---

[10]Testimony of Mr. Frank L. Perry. (A. 92)

[11]There is no prohibition in the Petitioner Church's constitution against a local church withdrawing. Testimony of Dr. Ben Rose. (A. 98)

> "If liberty is to mean anything, it must refer to individuals, not to institutions qua institutions—state, church, labor, or otherwise. It is not even an extension ad absurdum of the *Kedroff* reasoning to remark that it permits of higher church authorities the perpetration of fraud and deceit on their adherents, for alone as a self-limitation of the decision was something unfortunately sounding in 'clear and present danger'. The Court appeared unconcerned with the Soviet Communist influence in the affairs of the Russian church. That disposition is not surprising, for the institutional application of constitutional liberties leads logically to a stultification of the great Anglo-American concepts of property rights, among which is free contract, and the application thereto of common law concepts of fraud, deceit, duress, and the other developments which contribute to a well-ordered but free society."[12]

Issues arising from the fraudulent, arbitrary, or ultra vires conduct of the highest church tribunal which involve property rights will be heard by the civil courts. This theory is what might be called, the equitable, middle ground between *Watson* and *Kedroff*. The civil courts rightfully assume judicial oversight because of their inherent power to keep the peace in matters of property.

The civil court acts as a referee between the two disputants. This it should, when constitutional abuses of the highest church tribunal are present. There could be no greater exercise in futility, than for a local church to seek redress in the highest church court which had committed the transgressions that are the basis of the dispute. The highest tribunal would be acting in the capacity of judge and jury. Equity and justice would have little chance in such a forum.

---

[12]Richard W. Duesenberg, "Jurisdiction of Civil Courts Over Religious Issues", 20 Ohio State Law Journal, 508, 548 (1959).

If this Court concurs that in certain circumstances, the church should not be the arbiter of charged transgressions, how can it set the guidelines so that imagined or contrived complaints do not find their way to court?

First, restrict the judicial inquiry into issues involving the fraudulent, arbitrary or ultra vires actions of a church court. Such limitations are compatible with *Bouldin*, *Brundage*, *Gonzalez*, *supra*, and more recently *Romanian Orthodox Missionary Episcopate* v. *Trutza*, *supra*.

Second, examine the church's concept of property. Since its infant years, the Petitioner Church has embraced a congregational policy towards local church property.[13] This is evident in Paragraph 6-2 of the Book of Church Order[14] which grants to the local church absolute authority

---

[13]This historical position is presented in the section entitled, "The Rigid Enforcement by This Court of *Watson* v. *Jones*, will Create a Tyranny of Property." p. 23, *infra*.

[14]"6-2. If a particular church is incorporated, the provisions of its charter and by-laws must always be in accord with the Constitution of the Presbyterian Church in the United States. If the congregation is an incorporated body, all the communing members on the active roll of that church shall be members of the corporation. The officers of the corporation, whether they be given the title "Trustee" or some other title, shall be elected from among the members of the corporation in regularly constituted congregational meetings. The powers and duties of such officers must not infringe upon the powers and duties of the Session or the Board of Deacons. All funds collected for the support and expense of the church and for the benevolent purposes of the church shall be controlled and disbursed by the Session and the Board of Deacons as their relative authorities may from time to time be established and defined. To the officers of the corporation may be given by the charter and by-laws of the corporation any or all of the following responsibilities; the buying, selling, and mortgaging of the property for the church, the acquiring and conveying title to such property, the holding, and defending title to the same, the managing of any permanent special funds entrusted to them for the furtherance of the purposes of the church, provided that such duties do not infringe upon the powers and duties of the Session or of the Board of Deacons. In buying, selling and mortgaging real property such officers shall act solely under the authority of the corporation, granted in a duly constituted meeting of the corporation." (Respondent Church's corporate charter vests it with the powers granted in this paragraph.)

in the acquisition and alienation of property. The powers granted in this paragraph can be exercised free of any dominion of the Petitioner Church or lesser judicatories.[15]

Third, determine the amount of local autonomy. The limited judicial control over a local church by the Petitioner Church is confirmed by the autonomy granted the local church under the church polity. This independence includes: the election of ministers, the discipline of membership, the financing of programs, and the administration of church affairs. These temporal rights (property and administration) are the prerogatives of the local church.

Relating the historical concept of property to the autonomy of the local church, the Petitioner Church takes on a dual status—representative in spiritual matters, but congregational in temporal matters. The dual status established by the church polity permits this Court to modify *Watson* as it pertains to churches of the limited representative class.[16]

The fourth guideline is found in *Stewart* v. *Jarriel*, 206 Ga. 855, 55 S.E. 2d 368 (1950). Commenting when the courts may intervene in the internal affairs of a church, the Court said:

---

[15]The dispute in *Watson* involved what is now the Presbyterian Church U. S. A. (North). That church claimed dominion over the property of a local church. This policy was one of the obstacles to the reestablishment of relations between the Petitioner Church (Southern) and the Northern Church in 1875. (A. 97-98) This diametric difference in the philosophy of property reveals a fundamental difference in the polity of the two churches.

[16]"In the last analysis it must be said that all church societies may not lend themselves precisely to the three categories set forth in *Watson* v. *Jones* . . ., there may be varying degrees of autonomy. Where, . . . the Diocese has reserved unto itself certain powers of church administration . . . , and granted unto a superior tribunal, limited powers . . . those reserved powers must be protected. . . ." *Serbian Eastern Orthodox Diocese* v. *Ocokoljich*, 219 N.E. 2d at 352-353.

> *"So long as a professed creed is not subversive of the peace and good order of society,* it is not within the province of any department of the government to settle differences in creeds or determine what ought or ought not to be a fundamental of religious belief." (Emphasis added)

What is more subversive of peace and good order than to advocate "man is above the law"? This the Petitioner Church did at its General Assembly in 1965 and 1966, when it approved and reapproved civil disobedience.

These four criteria will limit abuse by any factious dissident. If he does not meet the test, the court will deny the adjudication of his complaint.

IV.

The Rigid Enforcement by This Court of Watson v. Jones, 80 (13 Wall.) U.S. 679 (1871), Will Create a Tyranny of Property

Basically the decision of the Supreme Court of Georgia affirmed the proposition that judicial abstention is not absolute even in the internal affairs of a religious association. Further, it acknowledged that courts will assume jurisdiction to reject the enforcement of a decision of a church tribunal where to enforce such would be offensive to the peace and good order of the commonwealth, would approve a collusive, fraudulent, or ultra vires act or would be repugnant to the principles of equity. The actions of the General Assembly of the Petitioner Church offend all of these.

Can this Court subscribe to the proposition that once a local church affiliates with a representative denomination that it is bound irrevocably by any act committed by the highest tribunal, be such act, valid or invalid, on the assumption that such is beyond judicial review? If this

Court should, it will establish tyrannical power in the highest church court. For no matter how far it may transgress its law, it can coerce a dissenting local church by wielding the bludgeon of property.

If this Court should find that conduct by the highest church tribunal, be it collusive, arbitrary, or ultra vires, be it inimical to the peace and good order of society, or be it violative of equity and conscience, is beyond judicial scrutiny, this will give the highest body of the representative church a "carte blanche" to do what it wills absolutely and without fear of legal redress. Armed with such absolute authority, a church court could advocate anarchy, embrace communism and deny the infallibility of the Bible. From the present conduct and orthodoxy of some church leaders, this is a dire possibility.

Such apostasies could be made with utter disregard for the outraged repercussions. For, if an incensed local church expressed its disapproval by withdrawal from the parent body, it would lose its property. This, then, will be the tragic impact of this Court's decision should it rigidly enforce *Watson* v. *Jones, supra.*

Forcefully as present, as the two propositions offended by the Petitioner Church, i. e., conduct inimical to the peace and good order of society and actions violative of the church's constitution, is the third, that of equity. It is present because of the early positioning of the Petitioner Church on the question of property rights, and its denunciation of *Watson* v. *Jones, supra.* More contemporary is the equity related to the history of the acquisition of the Respondents' property.

The Petitioner Church had its genesis in 1861 in Augusta, Georgia. Almost at its incipience the issue of property rights of the lesser judicatories (church, presby-

tery, and synod) was raised. In 1867 the Synod of Kentucky of the Presbyterian Church U.S.A. (North) sought to affiliate with the Petitioner Church. In a letter to the Petitioner Church, it prescribed a set of principles upon which it would join. One of these was the right in the synod to retain all legal claims and rights to property. In 1867 in response to the petition of the Synod of Kentucky, the General Assembly of the Petitioner Church, upon the recommendation of its committee submitted the following resolution which in part provided:

> "4. That this Assembly cordially approves of the determination of the Synod of Kentucky, as expressed in the fourth resolution of its minutes of June 28th, 1867, communicated by its commissioners to the Assembly to assert fully all its legal claims as a part of the 'Presbyterian Church in the United States of America', and to reserve all its legal rights of property as a Synod in any union which may be formed with this body." (A. 103)

Again in 1875, the Petitioner Church was confronted with the question of church property. Noting the turbulence within the states of Missouri, Kentucky and Tennessee, the General Assembly of the Petitioner Church adopted a resolution confirming the historical position of the church enunciated in 1839.[17] In presenting a resolution on church property, the Assembly made the following policy statement, which expressly disallowed any application of the "Walnut Street" decision to the Petitioner Church:

> "And now, without entering into a discussion concerning the *decision of the Supreme Court of the United States, in the case of the Walnut Street Church, Louisville, Ky., or how far the action of the General Assembly (North) of 1872, in approving the principles there laid down, was inconsistent with the action of*

[17]From minutes of Presbyterian Church U. S. A., of which it was formerly a part.

both the Old and New School Assemblies in approving precisely the opposite principle laid down by the courts of Pennsylvania, in the controversy of 1837 and 1839 (See Church case in Baird's Digest), we here propose that this whole matter shall be submitted to arbitration on the principles presented in the paper adopted by the Old School Assembly of 1839, and of which, for convenient reference, as well as general information, a copy is here given as follows (1839), p. 158):" (Emphasis added)

The principles referred to were those of equitable distribution, spelled out in 1839 in the following position on church property:

"Be it resolved by the General Assembly of the Presbyterian Church in the United States of America,

1. That this body considers itself and the Church at large bound, as both have been not only willing, but desirous, to adjust all claims against the corporate property of the Church, *whether legal or equitable*, in the most prompt, fair and liberal manner.

2. That this is especially the case touching any claims which may exist on the part of the four Synods of Utica, Geneva, Genesee and the Western Reserve, declared in 1837, to be no part of the Presbyterian Church or on the part of those who seceded from the Church in 1839, or on the part of any body constituted out of the whole or any part of these bodies and persons, the Assembly will faithfully adhere to any pledge or promise, express, or implied which it can justly be construed ever to have made, and will fulfill every expectation which it ever knowingly allowed to be cherished.

3. The Trustees of the Assembly are hereby authorized and requested to do, on the part of this Assembly should occasion offer, whatever is lawful, competent and equitable in the premises, conformable to the principles, and in the manner heretofore laid down

in the minutes of this Assembly for 1837 and 1838, so far as related to the corporate property of the Church, or any equities springing out of the same.

4. With reference to all institutions, corporations, congregations, and other public persons or bodies in connection with us, but holding property for ecclesiastical purposes, or for religious and benevolent uses, which property is not subject to the control of the Assembly, although the said person, institutions or congregations may be in all such cases where difficulties relating to property have arisen or shall arise in consequence of the long and painful disorders and divisions in our church, *we advise all our members and friends to act on the general principles heretofore laid down, and with the spirit of candour, forbearance, and equity which has dictated this Act.*

5. The Assembly reiterates the declaration, that its chief desire, in all this part of our church troubles, is to do even and ready justice to and between all persons and interests over which it has any control, or in regard to which it has any duty to perform. (Baird's Digest, p. 800)."

"In accordance with the excellent Christian spirit of this paper, we propose that a plan shall be now arranged by which so far as possible, all matters of church property that are in dispute, or that have not been parties, and all claims to property of any kind shall be settled by arbitration upon principles of equity and fair dealing as becometh Christians.

Should this proposal be such as you approve, we suggest that the details may be most satisfactorily arranged after an oral conference between the two committees." (A. 104, 105, 106) (Emphasis added)

The action of the General Assembly of 1875 was definite. It did one thing. It rejected the principle of *Watson v. Jones, supra* (referred to as the Walnut Street decision), as applying to the Petitioner Church (Presbyterian Church

U.S.), and confirmed the early position of the Petitioner Church which permitted congregations, presbyteries and synods to take the property with them.

This Court might conclude that the adherence to the precepts of the Old School Assembly referred to in the resolution of the General Assembly of 1875 was subsequently denounced. Such is not the case. The second paragraph of the 1964 revised edition of the Petitioner Church's Book of Church Order, at page 7 states:

> "When the Presbyterian Church in the United States (the Presbyterian Church in the Confederate States of America) came into being in 1861, it adopted the polity and discipline which had been in use in the Old School Assembly prior to the rupture." (R. 716 et. seq.)

This historical concept which emerged in the infant years of the Petitioner Church never has been rescinded. Only within the past two decades have any assaults been made upon it. These occurred in 1949, 1951,[18] and 1953. They were repulsed.

The principles of equity which governed the early church are present today. They should be invoked by this Court in behalf of the Respondents.

The equitable proposition becomes more significant when the history of the property owned and held by the Respondents is exposed. Of the three parcels, neither the Petitioner Church nor any of its lesser judicatories have any money invested in them. If a check list were made, it would read: acquisition, none; maintenance, none; debt service, none. The property on which the church shrine is located was a grant from the Independent Presbyterian Church in Savannah which has no formal connection with

[18]Statement of Ad Interim Committee Presented to General Assembly of Petitioner Church in 1951. (A. 107)

the Petitioner Church. The remaining properties which were acquired since December, 1930, have been paid for exclusively by the tithes, pledges, and offerings of the local church membership.

If this Court should ignore the equitable principle honored by the Petitioner Church for more than a century, it will create what has been described as:[19] "A denomination with a shrine, a shrine without worshippers, and worshippers without a shrine." This Court will have wrought by judicial fiat what the General Assembly of the Petitioner Church failed to do by legislative enactment.

V.

Is the General Assembly of the Petitioner Church So Sovereign That It Can Ignore the Church's Constitution Without Fear of Judicial Intervention

The Respondents charge that the Petitioner Church has offended its constitution. They ask, "is the power of the General Assembly so absolute that it is absolved from complying with its constitution?" If it is, it enjoys a unique position among voluntary associations. Labor unions and fraternal societies have been held to precise and strict compliance with their constitutions.

By demanding strict adherence to their organic laws, the courts are exacting from voluntary associations obedience to standards promulgated by them. Applying the rule of precise compliance to religious associations will not impose an unreasonable requirement upon them.

The Courts by imposing limitations on the actions of voluntary associations have established the authority to review their conduct. This judicial oversight is assumed to assure that substantive rights are not procedurally vio-

[19]Richard W. Duesenberg, "Jurisdiction of Civil Courts Over Religious Issues", 20 Ohio State Law Journal, 508, 548 (1959).

lated. Generally, the courts in examining the conduct of a voluntary association have adhered to the precise or strict standard. This has been true even in the sensitive realm of religious societies. The courts will not defer to the autonomy of a religious organization unless all of the procedural safeguards granted by its constitution have been followed impeccably. Applying the theory of *Bouldin* v. *Alexander, supra*, the Court in *Briscoe* v. *Williams*, 192 S.W. 2d 643, 646 (Mo. 1946), declared:

> ". . . , it assumes that the constitution was intended to be mutually binding upon all, and it protects the society in fact by recalling it to a recognition of its own organic law."

What was expressed in *Briscoe* was affirmed in *Trustees of Delaware Annual Conference* v. *Ennis*, 29 A. 2d 374 (Del. 1942). The Court condemning the ultra vires action of the General Conference of the Methodist Church held:

> "It was, thus, plainly beyond the power of the General Conference to make such a drastic change in the organic law of the church as to confer upon a committee any jurisdiction properly exercisable by a bishop alone."

Echoing the principle sounded in *Bouldin*, the Court in *Epperson* v. *Myers*, 58 So. 2d 150, 152 (Fla. 1952), after noting the traditional deference to a church tribunal, stated:

> ". . . the exception that when there is a showing of fraud, collusion or arbitrary conduct on the part of the church authorities, the courts will interfere to protect the rights of those imposed on."

Continuing the Court declared:

> "When a 'faction' of the church arrogates authority to itself, disrupts the organization and sets at

> naught well-defined rules of church order, there is no course left for those who desire their rights settled through orderly processes but to resort to the courts."

In *Randolph v. First Baptist Church of Lockland*, 120 N.E. 2d 485, 496 (Ohio 1954), the Court, in an opinion containing citations from numerous state courts, quoted approvingly from *Kerr's Appeal*, 89 Pa. 97 as follows:

> "The decree of a church judicatory is binding only where it is affirmatively shown that it has acted within the scope of its authority, and has observed its own organic forms and rules."

Legal principle and equity demand that the highest tribunal of any voluntary organization, be it fraternal, labor, or religious, abide by its organic laws. The courts cognizant of possible abuse, if the organic law is not faithfully followed, have taken jurisdiction to restrain or rectify any abuse.

Is a religious society so sacrosanct that its actions are not reviewable by a judicial tribunal, as are those others of voluntary associations? The courts have uniformly answered in the negative. It would appear that the basic rationale for such a response is this simple test. Churches and other voluntary associations have through their constitutional processes promulgated the organic rules of the society for the protection of the association, lesser bodies and the individual members.

When an ecclesiastical decision is challenged for noncompliance with the church constitution, judicial oversight is based upon equity. Judicial intervention is warranted to require church judicatories to follow the same standard they would impose upon lesser bodies.

The constitution of the Petitioner Church represents the collective thinking of the church from the Conference

of the Westminster of Divines in 1643 to date. In the succeeding years, since the adoption of the Westminster Confession, it has been affirmed, with modifications, in subsequent constitutions. It was the law in December, 1930, when the Respondent Church affiliated with the Petitioner Church.

Stripped of the impassioned cry of separation of church and state, this Court is confronted with the unsophisticated issue of whether or not the Petitioner Church is judically accountable for violating its constitution. There is no question of dogma; there is no interpretation of faith; there is the issue of constitutional accountability.

The Respondents contend, and this has been affirmed by the Supreme Court of Georgia, that the Petitioner Church through the actions of its General Assembly has violated specific sections of the Confession of Faith and Book of Church Order. The sound and fury which has been raised can be quelled by applying the organic law of the Petitioner Church to the charged transgressions. The Petitioner Church's constitution declares:

> "Synods and councils are to handle or conclude nothing but that which is ecclesiastical: and are not to intermeddle with civil affairs which concern the commonwealth unless by way of humble petition in cases extraordinary; or by way of advice for satisfaction of conscience, if they be thereunto required by the civil magistrate," (Ch. XXXIII, par. 4)

> "It is the duty of the people to pray for magistrates, to honor their persons, to pay them tribute and other dues, to obey their lawful commands, and to be subject to their authority, for conscience' sake. Infidelity, or difference in religion, doth not make void the magistrate's just and legal authority, nor free the people from their due obedience to him; from which ecclesiastical persons are not exempted. . ." (Ch. XXV, par. 4).

> "The power which Christ has given his Church is wholly moral and spiritual, and constitutes the Church a kingdom and government distinct from the civil commonwealth. . ." (Ch. I, par. 1-2). (A. 134)

Mindful that these sections of the Confession of Faith and Book of Church Order were part of the organic laws of the Petitioner Church in 1965 and 1966, do the actions of the General Assembly[20] offend them? The constitution either means what it says, or it says nothing. If it means what it says, the Supreme Court of Georgia must be affirmed. If it says nothing, then three hundred years of adherence to the inspired wisdom of consecrated men is mocked.

From *Watson* to *Kedroff* the courts have been plagued by where to draw the line in reviewing the conduct of the highest church court, where such is charged by a lesser church body to be noxious to its interest and violative of a particular part of the ecclesiastical law. They have concluded that they do not have to blindly adopt the decision of the highest church court as valid just because that supreme body acted. Judicial intervention is justified because the church constitution delimits the relation of the governor and the governed.

The theory of exacting strict adherence to the constitution of a church was advocated in *Bear* v. *Heasley*, 98 Mich. 297, 57 N.W. 376 (1893). Where the question of property right arose from the violation of the church's constitution by its General Conference (highest tribunal) the Court, finding for those in possession of the property, held:

> *"The constitution, having been adopted as the supreme law of the church, must be supreme alike over the assembly and people. If it is not, and only bind-*

[20]Resolutions of the General Assembly of 1965 and 1966 on civil disobedience and Viet Nam (129-133, 64-67).

ing on the latter, the supreme judicatory is at once a government of despotic and unlimited powers. But we hold that the assembly, like other courts, is limited in its authority by the law under which it acts; and when rights or property which are secured to congregations and individuals by the organic law of the church are violated by unconstitutional acts of the higher courts, the parties thus aggrieved are entitled to relief in the civil courts, as in ordinary cases of injury resulting from the violation of a contract or the fundamental law of a voluntary association." (Emphasis added)

The civil courts have properly assumed jurisdiction where there is an obvious violation of the church law with a resulting impairment of the property interest of the local church. If, as here, the charged infraction involved a flagrant violation of the church discipline, the courts more readily intervene. The dismal swamp of dogma is circumvented by following the route of discipline.

In keeping to the demarked path of discipline, the civil courts find themselves on familiar ground. For in reviewing the conduct of a church court which has disdained its constitution, the review is comparable to that of a civil court examining the act of a legislative assembly. The right in that sovereign body to act is unquestioned. But, as this Court is intimately aware, there is a distinction between acting validly and a valid act. Annually the assemblies of the states and the Federal Congress pass legislation according to the procedural rules. Years later their enactments may be contested in the courts. Many are struck down—procedurally valid, but legally void.

When the Petitioner Church, through its General Assembly, acted beyond its constitution, its autonomy became subject to judicial examination. The Supreme Court of Georgia so found.

VI.

Under the Circumstances the Respondents Did Not Have to Appeal from the Actions of Either the General Assembly or the Administrative Commission

The Petitioners have attempted to make an issue of the Respondents' inaction with regard to the pronouncements on civil disobedience made by the General Assembly (highest tribunal) of the Petitioner Church at its annual conference in 1965. This issue is grounded on the fact that the Respondents did not appeal this action.

Actually, there is no issue other than that contrived by the Petitioners. It can be disposed of by one question. Must a lesser tribunal appeal the ultra vires act of the supreme judicatory of a representative church? Apparently unaware to the Petitioners, this has been answered by the courts in the negative.

In *Trustee of Delaware Annual Conference* v. *Ennis*, 29 A. 2d 374 (Del. 1942), the Court responding to the issue of the failure of the Defendant to appeal an act of the General Conference of the Union American Methodist Episcopal Church held that it was not necessary for the Defendant to appeal the findings of a church tribunal (committee) which contravened the discipline (the law of the church) as the same was nugatory. This conclusion in matters involving religious societies has its parallel in numerous holdings by this Court.

Mr. Justice Field in *Norton* v. *Shelby County*, 118 U.S. 425 (1886), defined the ineffectiveness of an unconstitutional act:

> "An unconstitutional act is not a law; it confers no rights; it imposes no duties; it afford no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed." (118 U.S. at 442)

The action of the 1965 General Assembly countenancing civil disobedience was a patently unconstitutional act.[21] Being such, it was a nullity. No appeal was needed.

In response to the Petitioner's cry that the Respondents did not appeal from this action, the Supreme Court of Georgia replied:

> "Here, the Administrative Commission appointed by the Savannah Presbytery made no decision as to whether the general church had abandoned its original tenets of faith and practice. Furthermore, the local churches were not required to seek an adjudication of such issue within the framework of the general church because the diversions complained of had already occurred and the local churches had withdrawn and severed their connection with it." (A. 124-125)

This riposte exposes the fallacy of the Petitioners' outcry.

---

[21]The unconstitutionality of this action is affirmed by reference to pp. 136-137 (R. 711) of the Westminster Confession of Faith. Nowhere in the record is it shown that the Petitioner Church positioned itself on civil disobedience "by way of humble petition in cases extraordinary"; "by way of advice for satisfaction of conscience, if they be thereunto required by the civil magistrate." It is obvious that the first qualification refers to actions by the Government which are inimical to a church's interest under the guarantee of the First Amendment. The second is self-explanatory. The Church may act when its advice is sought by the commonwealth.

Of course the Petitioners have studiously avoided adverting to other parts of the Confession of Faith and Book of Church Order which have been transgressed:

> "It is the duty of the people to pray for magistrates, to honor their persons, to pay them tribute and other dues, to obey their lawful commands, and to be subject to their authority, for conscience' sake. Infidelity, or difference in religion, doth not make void the magistrate's just and legal authority, nor free the people from their due obedience to him; from which ecclesiastical persons are not exempted . . ." (Ch. XXV, par. 4).
>
> "The power which Christ has given his Church is wholly moral and spiritual, and constitutes the Church a kingdom and government, distinct from the civil commonwealth . . ." (Ch. 1, par. 1-2).

The Petitioners advert to the failure of the Respondents to appeal the action of the Administrative Commission of the Savannah Presbytery. Why this was not done must be obvious to this Court. The answer is conclusively found in the relationship of the Respondents to the presbytery at the time the commission acted and the significance of that action.

At the time that the commission responded by its resolution, dated May 19, 1966, the jurisdictional cord had been cut. The Respondents had disaffiliated. This, they had the right to do under the First Amendment and the constitution of the Petitioner Church. The constitution contains no prohibition against a local church severing. Having exercised the right to disaffiliate, no appeal was necessary.

However, as the Petitioners have focused attention upon the commission's action, the Respondents ask that it be appraised. If this is done, its pallidness will be exposed. It was innocuous; it dissolved nothing. It was impotent; it removed no member from the roll. It had the sterile effect of removing the pastor and the elders who had renounced their ties, previously. Why the commission did not take more aggressive action, which it could have under the Book of Church Order, is an enigma. Perhaps the answer is found in Chapter 6-3 of the Book of Church Order which provides:

> "If a church is dissolved by the Presbytery or otherwise ceases to exist, and no disposition has been made of its property, those who hold the title to the property shall deliver, convey and transfer to the Presbytery of which the church was a member, or to the authorized agents of the Presbytery, all property of the Church. . ."

Neither of the contingencies provided for in the above chapter were present, by action of the commission or circumstance of the church. The commission did not dissolve the church. The church had not ceased to exist. What, then, was the significance of the action of the commission? At best it sought to replace the pastor and elders. This constituted a recognition of the remaining congregation as a viable church body. It became the identity recognized as the continuing organization of the Respondent Church.

The dilemma created by the harmless action of the commission, was the precursor of subsequent deficiencies manifested in the Petitioners' pleading and presentation of their case.

VII

The Wall of Separation Is Not So Impregnable That a Denominational Church Is Not Subject to Reasonable Restraints upon the Liberties Guaranteed by the First Amendment

Since *Watson* v. *Jones,* supra, this Court has declared with unwavering consistency that temporal, governmental institutions must be free from religious interference. By so doing, it has affirmed the heritage of the separation of church and state conceived by the architects of the Constitution. Abuses of a state dominated by the church or a state in which one church was preferred were still fresh in their minds when they convened at Philadelphia in 1787.

What was declared in *Watson*[22] was amplified in *Reynolds* v. *United States,* 98 U.S. 145, 166, 167 (1879).

[22]"The structure of our government has, for the preservation of civil liberty, rescued the temporal institutions from religious interference . . ." 80 (13 Wall.) U.S. at 677).

This Court stated:

> "Can a man excuse his practices to the contrary because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances."

Keenly sensitive to any conduct inimical to the peace and good order of society, this Court since 1963[23], has voiced its condemnation of those who seek to subvert the integrity of government from the sanctuary of the First Amendment.

Mr. Justice Frankfurter projected the evil of elective respect for the law, 'If one man can be allowed to determine for himself what is the law, every man can. That means first chaos, then tyranny."

The First Amendment does not grant to anyone or any group the right to determine the bounds of freedom. Of necessity, these must be delimited by government. Mr. Justice Jackson drew the line when he said:

> "Civil government cannot let any group ride rough-shod over others simply because their 'consciences' tell them to do so."[24]

Almost a century prior to *Watson*, Alexander Hamilton declaimed why government can not compromise with conscience: "Government implies the power of making laws. It is essential to the idea of a law that it be attended with sanction. . ."[25]

---

[23] *Cox* v. *Louisiana*, 379 U.S. 559 (1965), *Brown* v. *Louisiana*, 383 U.S. 131 (1966) (Mr. Justice Black's dissent), *Adderley* v. *Florida*, 385 U.S. 39 (1966).

[24] *Douglas* v. *City of Jeannette*, 319 U.S. 157, 179 (1943).

[25] *The Federalist*, No. 15 (Hamilton).

Civil disobedience affirmed and reaffirmed by the Petitioner Church is destructive of the law. Like the siren's call, it beckons to those dissidents who believe that the end justifies the means. They say, "The law be damned." The Honorable Edwin N. Griswold, Solicitor General of the United States, summed it up when he said:

> "The crucial attribute of civil disobedience is that it is expressed through deliberate violation of the law."[26]

Finding that the Petitioner Church had violated its constitution, the Supreme Court of Georgia asserted:

> "The General Assembly's endorsement of civil disobedience, which would allow a citizen to decide whether or not he will obey the law, is a radical venture into civil affairs. It is absolute defiance of law and order and is the road to anarchy."

This ominous prophecy is consonant with the historical philosophy of this Court. Through the years adherence to liberty under the law has emanated from this Bench in the written and spoken word. "We also reaffirm the repeated decisions of this Court that there is no place for violence in a democratic society dedicated to liberty under the law."[27]

This Court's position on civil disobedience affirms Mr. Justice Roberts' conceptual analysis of the First Amendment, "Thus the Amendment embraces two concepts—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second can not be. Conduct remains subject to regulation for the protection of society."[28]

---

[26]*Dissent—1968*, Tulane Law Review, Vol. XLII, No. 4, pp. 726-739 (June, 1968).

[27]*Cox* v. *Louisiana*, 379 U.S. 559, 574 (1965) (Mr. Justice Goldberg).

[28]*Cantwell* v. *Connecticut*, 310 U.S. 296, 303-304 (1940) (Mr. Justice Roberts).

Now this Court is confronted with an issue which requires that it reassert its position condemning religious interference which has breached the separating wall. If this Court should ignore the gravity of this assault, the delicate balance will be destroyed, and the wall of separation irreparably breached. But more, however this Court may phrase its decision, it will be interpreted as countenancing civil disobedience.[29]

There is a "clear and present danger". The pronouncements on civil disobedience have created an atmosphere of disrespect for the law which has spawned a maelstrom of violence.

The brutal terror that convulsed France in 1792 and 1793 could be experienced here. The lengthening corridor of time still reverberates to the anguished outcry of that era, "Liberty, what crimes are committed in thy name."

If the restraint of the law is removed from ecclesiastical institutions, a fatal blow will have been delivered to the concept of government conceived by our forefathers. For surely, as feared, ours will become a government of men, and not of laws. The anarchy prophesied by the Supreme Court of Georgia will be followed by tyranny. History affirms.

---

[29]"For the Court to place its imprimatur upon it (influence the administration of justice) is a misfortune that those that love the law will always regret", *Cox* v. *Louisiana*, 379 U.S. at 589 (1965) (Mr. Justice Clark's dissent).

REBUTTAL

If it were not for the sophistical reasoning, neither time nor space would be used in replying to the Petitioners' assertion that the effect of the ruling of the Supreme Court of Georgia was to freeze the doctrine of the Petitioner Church and destroy its self-government. This argument may be found at pages 19 and 20 of the Petitioners' brief.

As emphasized previously, the Petitioner Church, and any in its class, can advocate, embrace, and practice whatever it wishes, within the confines of its constitution. Too, it may alter its dogma and discipline at any time. The only limitation is the constitutional process. If those churches in the representative class wish to advocate civil disobedience free of ecclesiastical prohibition, they may remove the restraint.

The Petitioners' conclusion that the action of the Supreme Court of Georgia has forced a particular religious doctrine on all affiliated with the Presbyterian Church is preposterous. A plea of this kind can only evoke tolerant amazement. It would have been revealing if the Petitioners had identified one Presbyterian who had experienced what they contend. The fact is the General Assembly of the Petitioner Church could not have cared less. It reiterated its approval of civil disobedience at its 1968[30] convention.

The argument that the Georgia decision would freeze the faith of other hierarchical churches, and therefore, one who wishes to practice civil disobedience would have no place to go unless the church constitution condoned, certainly depicts a frustrated soul. He can be seen running from church to church desperately pounding on the outer door seeking admission. He will find a sanctuary. Odds are

---

[30]This action was taken approximately five months after the decision of the Supreme Court of Georgia.

that those religious institutions which have countenanced, encouraged, or participated in civil disobedience will have their doors open.

Contrary to what the Petitioners picture—a frozen faith and a frustrated follower—affirmation by this Court of the decision of the Supreme Court of Georgia, will have a salubrious and chastening effect upon all churches in the representative and hierarchical classes. It will put them on notice that a church constitution is a compact between the highest church court and the lowest congregation. It is for the protection of the majority and minority alike. It must be respected.

There was nothing in the decision of the Supreme Court of Georgia which held that dogma and discipline are not subject to change. The Petitioners' observation to the contrary is without justification. In effect, that Court said, "Abide by your constitution or amend[81] it."

CONCLUSION

The Supreme Court of Georgia found that the Petitioner Church, through its General Assembly, had violated the Book of Church Order and Confession of Faith. By this decision, it upheld the discipline and dogma of the church which declared that the church was a spiritual body distinct from the commonwealth.

Should this Court yield to the argument of the Petitioners and find that the Supreme Court of Georgia by its decision offended the First Amendment, it would be in the position of establishing a religious discipline and dogma

[81]The Confession of Faith and the Book of Church Order can be amended by the advice and consent of the Presbyteries. To amend the Confession of Faith requires a three-fourths preference. To amend the Book of Church Order requires a concurrence of a majority. (Book of Church Order, Ch. XXX, par. 1-2) (R. 711 et seq.)

which would negate that unequivocally declared in the existing church constitution.

A reversal by this Court would nullify those sections of the Book of Church Order and Confession of Faith which proclaim with evangelical spirit that the mission of the Petitioner Church is spiritual and not temporal. A reversal by this Court would place it in the paradoxical position of asserting that the Petitioners' constitution was not the discipline and dogma of the Petitioner Church on April 17, 1966, when the Respondents severed.

Of more calamitous effect, a reversal by this Court would place its judicial blessings upon the constitutional transgressions of the Petitioner Church.

> *"Let reverence for the law . . . be taught in the schools, in the seminaries, and in the colleges. Let it be written in primers, in spelling books, and almanacs. Let it be preached from the pulpit, proclaimed in legislative halls, and enforced in courts of justice; and in short, let it become the political religion of the Nation."*
>
> Abraham Lincoln

Respondents respectfully submit that the Judgment of the Supreme Court of Georgia should be affirmed.

Respectfully submitted,

OWEN H. PAGE
Attorney for Respondents, Eastern Heights Presbyterian Church, et al.

305 Realty Building
Savannah, Georgia 31401